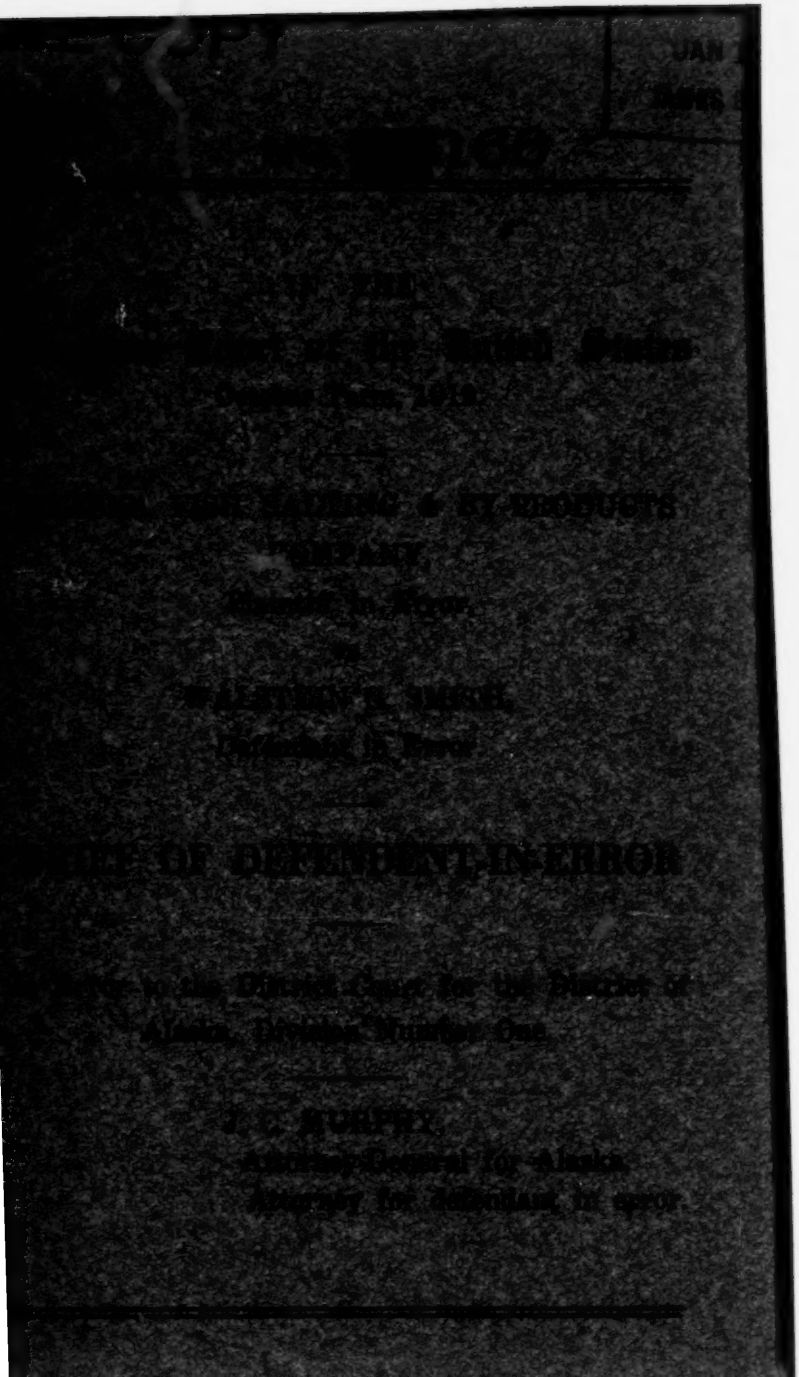

IN THE

Supreme Court of the United States

October Term, 1919.

ALASKA FISH SALTING & BY-PRODUCTS COMPANY,

Plaintiff in Error,

vs.

WALSTEIN G. SMITH,

Defendant in Error.

BRIEF OF DEFENDENT-IN-ERROR

STATEMENT OF THE CASE.

This case was started in the United States District Court of the Territory of Alaska, Division No. 1, by the plaintiff, to recover from the defendant, the Treasurer of the Territory, the sum of Ten Thousand Two Hundred and Ninety-eight

(10,298.00) Dollars, together with interest, which has been paid to him by the plaintiff as taxes for the years 1917 and 1918 on the product of its plant situate at Killisnoo, Alaska, to-wit: Fish oil and fish meal, in accordance with the provisions of the Alaska Legislature, Chap. 74, Sec. 1, Sub-div. 10, Session Laws of 1917, and Chap. 33, Sec. 1, Sub-div. 8, Session Laws of 1919.

The complaint of the plaintiff was demurred to by the defendant, by his attorney, the Attorney General for the Territory of Alaska, (p. 21 of Record) which demurrer was sustained by the Court in its well-considered opinion (pp. 24 to 30 inc. of Record), and from the judgment entered (pp. 30 and 31, of Rec.) a writ of error to this Court has been sued out.

BRIEF OF THE ARGUMENT.

The assignments of error set up by the plaintiff in error and the argument in support thereof, may be grouped into two sections:

1st. That the taxing acts of the Territorial Legislature involved in this controversy are in contravention of the 5th and 14th amendments of the Constitution of the United States; and,

2nd. That the said acts violate the provisions of the Organic Act creating the Territorial Legislature and granting unto it certain taxing powers.

Necessarily if the contention of plaintiff in

error under the first grouping is correct, the case must come to an end in its favor.

ARGUMENT.

I.

ARE THE TERRITORIAL TAXING ACTS IN CONTRAVENTION OF THE 5TH AND 14TH AMENDMENTS OF THE CONSTITUTION OF THE UNITED STATES BECAUSE, AS CLAIMED BY PLAINTIFF IN ERROR

A. *The tax upon fish meal and fish oil, manufactured wholly or partly from herring, is excessive in comparison with the tax levied on other lines of business?*

Plaintiff in error complains of the fact that its business is destroyed by reason of the high tax and claims as a fact that its business is at best only yielding a very moderate profit.

It is a well-known fact that the price of fish oil and fish fertilizer, like that of other commercial articles, is fluctuating, and that at the present time fish meal manufactured from herring is selling at from $112.00 to $120.00 per ton, and that fish oil manufactured from herring is selling at from 45c to 60c per gallon (being approximately ten cents per gallon higher than fish oil manufactured from salmon).

The Legislature may itself select the lines of business upon which it may impose a tax and it is beyond the province of the judiciary to control the acts of the Legislature in that respect. It is wholly immaterial what may have been the purpose or motive which animated the Legislature in imposing the tax in question. The remedy, if any, lies with the people who elect the Legislature.

As was said by this Honorable Court in

Austin vs. Boston, 7 Wall, 694, 19 L. Ed. 224

> "The right of taxation, where it exists, is necessarily unlimited in its nature. It carries with it inherently the power to embarrass and destroy."

Again, in

Spencer vs. Merchant, 125 U. S. 355, 31 L. Ed. 767, this Court, speaking through Mr. Justice Gray, said:

> "The judicial department cannot prescribe to the legislative department limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons; but the responsibility of the Legislature is not to the courts, but to the people by whom its members are elected."
>
> "A state does not deny the equal protection of its laws merely by adjusting its revenue laws and taxing systems in such a way as to favor certain industries or forms of industry."

Quona vs. Kirkendall, 223 U. S. 62, 56 L. Ed. 350.

Counsel in his brief sets up the various amounts of taxes required of the various lines of business carried on in the Territory and thereby attempts to prove that the business of the plaintiff in error is excessively taxed.

When Congress, under the Organic Act, created the Territorial Legislature and authorized it to "impose other and additional taxes" it undoubtedly realized that the Territory would be unable to carry on its business with the limited amount of revenue provided for under former Congressional Acts and gave it express authority to increase the amount of taxes already imposed, and that such was its clear understanding is demonstrated by the decision of the United States Circuit Court of Appeals, in the case of

Pacific American Fisheries vs. Territory of Alaska 236 Fed. 52.

The Territorial Legislature, at its various sessions since its creation in 1912, has changed and increased the license taxes imposed upon various callings, and especially in those cases affecting the fishing business, until, at its session in 1919, it doubled the tax on canned salmon, and in addition thereto required the payment of an income tax of one per cent on the net income of all salmon canneries.

Neither is the tax on fish meal and oil, produced in whole or in part from herring, so very

high when it is remembered that practically 20,000 pounds of herring are used in the manufacture of 2000 pounds or one ton of fish meal.

Counsel for plaintiff in error has attached to his brief (pp. 48 to 55 inc.) a schedule showing the amount of license tax imposed by the Territory on businesses, trades and professions, attempting to show thereby that the license taxes imposed are fair and nominal on all other revenue sources except that of his client, which he claims is unfair, unequal and confiscatory.

The Territorial tax on canned salmon equals approximately five cents per case. In a case of salmon there are forty-eight pounds of fish, and the waste is approximately forty-two pounds per case. Therefore the Territory receives from every pound of salmon caught for canning purposes approximately $.00055. If this same rate was charged for the herring, which concededly has as much, or more nutritive value than salmon, plaintiff would have to pay $11.00 per ton instead of $2.00 for its product, and considering that plaintiff in error also extracts oil from the fish converted into meal, it is still paying the Territory in tax much less pound for pound than are the canners of salmon. But the conclusive argument to show that the Alaska Legislators were reasonable in assessing the tax complained of by plaintiff in error, is the fact that the production of fish oil and fish meal from herring is an increasing industry in Alaska. ....

Notwithstanding the tax complained of by plaintiff in error, and its claim that its business has been "taxed to death," the fact nevertheless remains that quite a number of other concerns have engaged in the enterprise with acknowledged great financial profit.

The following firms have paid into the Territorial Treasury as tax on fish oil and fish meal, made wholly or in part from herring, for the year 1919, the following sums:

Alaska Herring & Sardine Co., Port Walter Alaska	$ 784.55
Hoonah Packing Co., Hoonah, Alaska	374.00
Chatham Strait Fish Co., Big Port Walter Alaska	1129.00

The foregoing companies, together with the Alaska Reduction Company, Hawk Inlet, Alaska, and John Carlson & Co., another Alaska firm, took out licenses in accordance with Territorial regulations for the production of fish meal and fish oil from herring, for the season of 1920, and during that year engaged in manufacturing meal and oil from herring, and thus far have shown no disposition to dispute the tax equally assessed against them and plaintiff in error.

In accordance with a bulletin of the United States Department of Agriculture, No. 150, dated January 23rd, 1915, p. 66, for the season of 1913, Alaska herring yielded 1200 tons of dried fertilizer

and 260,000 gallons of oil. For this purpose there was used 57,800 barrels of 200 lbs. each, of raw hering. Allowing 52 gallons to the barrel for oil and presuming a tax of $2.00 per barrel on oil and $2.00 per ton on fertilizer, this output would have netted $12,400 in taxes.

On the other hand, had the Territory collected a tax per pound on raw herring, the same as is herein approximated from its five cents per case tax on salmon, this same herring catch would have yielded $32,790.00 in taxes.

B. *Because the tax is confiscatory and is not a revenue measure but was designed and intended to destroy the business of the plaintiff in error.*

This Court, time and again, has held that "the power to tax is the power to destroy."

McCray vs. United States, 195 U. S. 26, 49, L. Ed. 78.

The business of the plaintiff has not been singled out with the object or purpose in view of affecting the plaintiff in error in this particular case, any more than any other person or corporation which may be engaged in the business of manufacturing fish meal and oil from herring.

The tax provision acts uniformly on all persons engaged in the particular line of business. There is no distinction made between persons engaged in the particular line,—that is, manufactur-

ing said articles from herring, and there is no discrimination against the plaintiff which is not equally applicable to any other person following the same line.

It is true, as contended by plaintiff in error, that this particular tax is not imposed upon fish meal and oil made from other fish. Plaintiff in error confines much of its argument upon this feature of the case.

The learned trial Judge, in answering plaintiff's contention that "there are no existing distinctions which differentiate the business of plaintiff from the business of making fish oil out of other fishes than herring," says:

> "To persons familiar with the fishing industry in Alaska a very probable basis for classification immediately suggests itself, and that is this: While the herring is a food fish for man, yet so also is the salmon. It is well known that the salmon feed largely on herring, and it is also easily conceivable as to be said to be probable that the Legislature considered that the using of herring in large quantities for the manufacture of fish oil and fertilizer so depletes the food supply of what the Legislature considered the more valuable and desirable 'food for man' (that is, the salmon), as to seriously diminish the 'run of' the latter. If so, that fact alone would contitute a sufficient basis for classification."

The situation mentioned by the Court,—that is, the fact that the Legislature made the classification between fish meal and oil produced from her-

ring and from other fish in order to more or less protect the salmon industry, is well bourne out by the fact that there has been for a number of years, a growing agitation against the use of herring,—a recognized food fish,—for the manufacture of fertilizer, meal and oil.

The discrimination against the manufacture of meal and oil from a food fish, like herring, (as against the same material produced from salmon offal), would seem to be well justified and is in harmony with the language of this Honorable Court in

Quong Wing vs. Kirkendall, 233 U. S. 56 L. Ed. 350,

where the Court, through Mr. Justice Holmes says:

> "The legislature may make discriminations, if founded on distinctions that we cannot pronounce unreasonable and purely arbitrary. If the State (Montana) sees fit to encourage steam laundries and discourage hand laundries, that is its own affair."

And we may say in analogy, is it not the affair of the Territory of Alaska as to whether or not it will discourage the production of fertilizer from food fishes such as herring, and encourage the production of these articles from non-food fishes and from the offal of other food fish, such as salmon?

There is a very real and far reaching difference in the two instances, and the particular point

at which that difference is emphasized by legislation is largely within the discretion of the Legislature. While it is true that fish meal and oil is produced both from herring and other fish material (salmon offal) the fact remains that oil and meal produced from herring is a distinct commercial article and superior to the article produced from salmon offal and commands a far better price. The regular Trade Journals speak, and in their market reports give the different quotations for "herring oil" and "salmon oil" and the two are never alike.

We respectfully submit that the classification is based upon some real and substantial distinction, —the one providing for a product made from food fish,—the other for a product made from waste, —and the distinction bears a reasonable and just relation to the things in respect to which such classification is imposed.

The object sought, as is admitted by plaintiff in error, is revenue. The Legislature, with full knowledge of the conditions as they exist, has said that he who takes valuable food fishes (herring), from the waters and converts them into fertilizer, must pay a tax, and he who manufactures the same article out of waste fish material, pays no tax. There is here no arbitrary or whimsical classification.

II.

HAS THE TERRITORIAL LEGISLATURE, UNDER THE ORGANIC ACT OF AUGUST 24TH, 1912, POWER TO IMPOSE THE TAX IN QUESTION?

An act of Congress, approved June 26th, 1906, (Chapter 3547, 34 Stat, 478) provides for the protection and regulation of the fisheries of Alaska. In this particular act a license tax of ten cents per barrel on fish oil, and twenty cents a ton on fish meal (fertilizer) is imposed.

The organic act of August 24th, 1912, creating the Territorial Legislature, provides a certain limitation upon the powers of the Legislature. The act provides:

> "The authority herein granted to the Legislature to alter, amend, modify and repeal laws in force in Alaska shall not extend to * * * the game, fish and fur-seal laws, or to the laws of the United States providing for taxes on business and trade; *provided further* that this provision shall not operate to prevent the Legislature from imposing other and additional taxes or licenses."
>
> Sec. 3, Act of August 24th, 1912.

Under this state of the law, plaintiff in error claims that the Legislature has no authority to increase the tax theretofore imposed by Congress upon fish oil and fertilizer.

The provisions of both acts have been before

the United States Circuit Court of Appeals for the Ninth Circuit in the case of The Alaska Pacific Fisheries vs. Territory of Alaska, 236 Fed. 52, and were construed by that court against the contentions of plaintiff in error. That Court says:

> "When Congress, in 1912, conferred the legislative power which we have shown exists, while it expressly witheld power to alter or amend laws pertaining to fish and other certain subjects and saved certain laws then in force, it nevertheless unmistakably transferred power to the newly created legislative body to impose other and additional taxes and licenses; that is, power to impose taxes different from, and it might be additional to, those already in force when the Organic Act was approved. And thus by the Organic Act those general provisions for the protection of the fish which we find in the act of 1906 were kept in force without possibility of alteration, amendment, or repeal by the Territorial Legislature, and the specific license tax provided by the act of 1906 was kept in force, but with power transferred to the Legislature to impose, if it should see fit, other and additional license taxes.
>
> "We cannot agree that the portion of the act of 1906 which provides for license fees and taxes is inseparable from the other provisions of that act. The protection and encouragement of fisheries was evidently one of the main purposes of the act, and the creation of revenue by the imposition of a license tax on the business of canning and manufacturing was another purpose. Those portions of the act which have to do with the methods of carrying on fishing, and which prescribe the seasons when it may be carried on, and the waters

within which it may be carried on, are preserved; but the imposition of additional license taxes to be imposed for carrying on the business was a subject of a different character and, in the judgment of Congress, might properly be entrusted to the wisdom of the newly created Legislative assembly. The history of the passage of the Organic Act shows that somewhat peculiar conditions were presented with respect to providing for the fiscal needs of the Territory. No general property tax laws obtained. Revenue would have to be raised, and naturally some scheme of license taxation of the extensive industries carried on in the Territory presented itself for adoption. The business of fishing, therefore, became a main subject for consideration by Congress in the question of future taxation. The Congressional Records disclose that after discussion it was decided not to abridge too far the transfer of power in the Legislature to adopt its own scheme of levying taxes and licenses upon the fishing business; Congress reserving to itself, by section 20 of the Organic Act, the possible exercise of the power to nullify any law passed by the Territorial Legislature."

Under this decision it is apparent that the Territory has the power to impose new taxes and also taxes in addition to those already in force.

The act of Congress which in 1906 imposed a tax of ten cents per barrel and a tax of twenty cents per ton on fish oil cannot be considered and is not a "fishing law." It is simply a tax on a certain business imposed, not upon fishing, but on the pursuit of a certain line of business. One may

catch as many herring as one likes without being required to pay any tax or license, but one may not carry on the business of manufacturing oil or fertilizer without paying a certain tax.

The final contentions made by plaintiff in error, to the effect that the imposition of the taxes complained of are contrary to the Organic Act, in that their effect is to alter, modify, amend or repeal the Congressional Acts of June 6, 1900, and June 26th, 1906, and that the taxes imposed under the Territorial Acts are not uniform and are not levied under general laws, have all been considered by the United States Circuit Court of Appeals for the Ninth Circuit, in the case mentioned above, Pacific American Fisheries Company vs. Territory of Alaska, and were disposed of by that Court contrary to the views expressed by plaintiff in error.

Upon these points that Court said:

> "We take it to be indisputable that the creation of revenue by the imposition of license taxes upon carrying on of business is, in a general sense, a rightful subject of legislation. But in this matter inquiry into the general question is unnecessary, for, as already pointed out, we have expressed transfer of authority to the Territorial Legislature to impose license taxes. The power, therefore, being in the Legislature, such taxes may be imposed without the restrictive limitation which must control in levying taxes upon property in its usual sense. Many well-considered cases might be cited holding that taxes which are levied on occupations, business, or, it may be, fran-

chises, are not brought within the principle of equality and uniformity in the sense that the Legislature must make the taxation of all occupations or pursuits equal.

"In Binns vs. United States, 194 U. S. 486, 24 Sup. Ct. 816, 48 L. Ed. 1087, we find a helpful discussion of the taxing power of Congress with respect to Alaska. A statute passed by Congress required one 'prosecuting' a 'line of business' within Alaska to obtain a license from the District Court in Alaska and pay for the license for the 'line of business' a certain prescribed fee. The statute also provided that, if one attempted to do business without having first paid the license, he should be deemed guilty of a misdemeanor. Binns was prosecuted and convicted of violation of this statute. Upon review, the argument in behalf of Binns was that the statute referred to conflicted with section 8 of article 1 of the Constitution of the United States, which reads:

> 'The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States.'

"The Supreme Court, through Justice Brewer, accepted the purpose of the Alaska law fixing license fees to be the collection of revenue, and conceded that license fees are excises within the constitutional sense of the term; but, even so, the court held that they were to be regarded as local taxes imposed for the purpose of raising funds to support the administration of local government in Alaska, and that Congress had plenary power, except as con-

trolled by the Constitution, to legislate for the Territory of Alaska. The court said:

> 'It may legislate directly in respect to the local affairs of a Territory or transfer the power of such legislation to a Legislature elected by the citizens of the Territory * * * For Alaska, Congress has established a government of a different form. It has provided no legislative body, but only executive and judicial officers. It has enacted a penal and civil code. Having created no legislative body and provided for no local legislation in respect to the matter of revenue, it has established a revenue system of its own, applicable alone to that Territory. Instead of raising revenue by direct taxataion upon property, it has, as it may rightfully do, provided for that revenue by means of license taxes * * * In the exercise of this power, Congress, like any state Legislature unrestricted by constitutional provisions, may at its discretion, wholly exempt certain classes of property from taxation, or may tax them at a lower rate than other property.'

"We think these views are applicable and controlling in the present case, because, when Congress gave to the Legislature of the Territory the power to legislate upon all rightful subjects not inconsistent with the laws of the United States, it thereby exercised the right to transfer the power which it itself had, and the Legislature could use it, subject, of course, to such constitutional limitations as always surrounded the Congressional power and to such further limitations as Congress might see fit to throw about the power transferred."

CONCLUSION

From the foregoing brief and argument following the decision of the Circuit Court of Appeals for the Ninth Circuit (236 Fed. 52) and the able opinion of the United States District Judge in sustaining the demurrer (Record, pp. 24-30), we believe that the Court will agree that neither the Constitution of the United States, nor the Organic Act creating the Territorial Legislature for Alaska have been violated by the passage of the license tax complained of by plaintiff in error, and that this Honorable Court will see fit to sustain the judgment of the lower court.

Respectfully submitted,

J. C. MURPHY,
Attorney-General for Alaska.
Attorney for defendant in error.